

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ROBERT MACKEY,

Petitioner, : Case No. 3:19-cv-290

- vs -

District Judge Walter H. Rice
Magistrate Judge Michael R. Merz

CHAE HARRIS, Warden,
Lebanon Correctional Institution,

:
Respondent.

TRANSFER ORDER

This habeas corpus case was brought *pro se*¹ by Petitioner Robert Mackey under 28 U.S.C. § 2254 to obtain release from his imprisonment as a result of his conviction in the Court of Common Pleas of Clark County, Ohio, in that court's Case No. 97-CR-318 (Petition, ECF No. 4, PageID 23).

On initial review under Rule 4 of the Rules Governing Habeas Corpus Cases, Magistrate Judge Merz noted that this was Mackey's third habeas corpus application for relief from that conviction (Report, ECF No. 5, PageID 36-37). Because Mackey claimed the benefit of a change in the law, the Magistrate Judge recommended construing his Petition as a motion for relief from the judgment in his first habeas case. *Id.* at PageID 37-39. Mackey objected: "Petitioner asks that his habeas not be construed as 60 degree [sic] motion, but be held as a change of law and allow

¹ Mackey was represented by counsel in his two prior habeas corpus cases in this Court and in the Sixth Circuit.

the new change to affect this case and allow the benefit to affect Robert Mackey's case as stated by the 6th Circuit." (ECF No. 10, PageID 44).

In a Supplemental Report after recommittal, Magistrate Judge Merz accepted Mackey's position that he did not intend to file a Fed.R.Civ.P. 60(b) motion. That being the case, the Magistrate Judge recommended that the case be transferred to the Sixth Circuit as a second or successive habeas application for that court's decision on whether it could proceed (Supplemental Report, ECF No. 12, PageID 48).

Petitioner has now filed what he labels as Objections, but states several times he does not object to transfer of the case to the Sixth Circuit (ECF No. 15, PageID 51, 52). However he also "does not wish to waive his objections pertaining to this issue," arguing his case is characterized by "extraordinary circumstances." Although he concludes by asking that the writ be granted, this Court lacks jurisdiction to grant (or deny) relief on the merits because this is a second or successive Petition.

Accordingly, it is hereby ordered that this case be TRANSFERRED to the Sixth Circuit for determination under 28 U.S.C. § 2244(b).

November 20, 2019.



Walter H. Rice
United States District Judge